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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/665,670	09/18/2003	Heather Lynn Focht	9042M	8580
27752	7590	09/01/2010	EXAMINER	
THE PROCTER & GAMBLE COMPANY			CHANNAVAJJALA, LAKSHMI SARADA	
Global Legal Department - IP			ART UNIT	PAPER NUMBER
Sycamore Building - 4th Floor				
299 East Sixth Street			1611	
CINCINNATI, OH 45202				
MAIL DATE		DELIVERY MODE		
09/01/2010		PAPER		

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HEATHER LYNN FOCHT, CHRISTOPHER DEAN PUTMAN,
CHEYNE POHLMAN THOMAS, and KARL SHIQING WEI

Appeal 2010-003058
Application 10/665,670
Technology Center 1600

Before EDWARD C. KIMLIN, PETER F. KRATZ, and
FRANCISCO C. PRATS, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

This appeal under 35 U.S.C. § 134 involves claims to a personal cleansing article composed of a package that contains a striped personal cleansing composition. The Examiner rejected the claims as obvious.

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

The Specification discloses “striped liquid personal cleansing compositions comprising a cleansing phase and a separate benefit phase wherein the two phases are packaged in physical contact while remaining stable for long periods of time” (Spec. 1). Because the composition’s “benefit phase” contains skin conditioners, the overall composition “provides both cleansing and improved skin conditioning benefits” (*id.* at 2).

Claims 1, 2, 4, 5, 7-14, and 19-29 stand rejected and are on appeal (App. Br. 1-2). Claim 1 is representative and reads as follows:

1. A personal cleansing article comprising a package containing a striped personal cleansing composition comprising:
 - (a) a first stripe comprising a cleansing phase comprising a surfactant and water; and
 - (b) at least one additional stripe comprising a substantially anhydrous benefit phase comprising at least about 20%, by weight of said benefit phase, of a hydrophobic material having a solubility parameter of from about 5 to about 15 (cal/cm^3)^{0.5}; wherein the benefit phase has a Consistency value of from about 1 to about 10,000 poise;

wherein said striped personal cleansing composition is in a form selected from the group consisting of liquid, semi-liquid, cream, lotion, gel, and mixtures thereof; and wherein said cleansing phase and said benefit phase are in physical contact within said package.

The Examiner cites the following documents as evidence of unpatentability:

Chambers	US 5,612,307	Mar. 18, 1997
Hayward	US 6,534,456 B2	Mar. 18, 2003
Frantz	US 2003/0180246 A1	Sep. 25, 2003

The following rejections are before us for review:

- (1) Claims 1, 2, 4, 5, 7-9, 14, and 19-29, rejected under 35 U.S.C. § 103(a) as obvious over Chambers and Hayward (Ans. 3-6);
- (2) Claims 10-13, rejected as obvious over Chambers, Hayward, and Frantz (Ans. 6-7).

OBVIOUSNESS -- CHAMBERS AND HAYWARD

ISSUE

The Examiner cites Chambers as teaching a two-phase composition in which the ingredients in the two phases meet the physical parameters recited in the rejected claims (Ans. 3-4). The Examiner concedes, however, that Chambers does not meet the claimed feature requiring the cleansing and the benefit agents to be in physical contact when packaged, but “instead teaches separating the two components thus avoiding direct contact with another so as to prevent any adverse actions that may occur between the two components and resulting in ineffective deposition of the benefit agent” (*id.* at 4).

The Examiner cites Hayward to meet that deficiency (*id.*). The Examiner notes that Hayward specifically describes its disclosure as an improvement over the Chambers patent (*id.*). In particular, the Examiner finds, Hayward discloses two-phase systems encompassing the two phases recited in Appellants’ claims, the phases having specific viscosity properties

allowing them to be stably packaged together “without any partitions i.e., . . . in physical contact” (*id.* at 5).

Based on these teachings, the Examiner concludes:

[I]t would have been obvious for one of an ordinary skill in the art at the time of the instant invention to optimize the rheological properties of two phases of the composition of Chambers so as to be able suspend both the phases together without any partition between the phases and thus extrude them together as stripes and still be able to maintain the viscosity because Hayward teaches several ways to alter the viscosity of the lamellar and isotropic phases so as to obtain a desired final product.

(*Id.* at 6.)

Appellants argue that the Examiner failed to make a *prima facie* case of obviousness because modifying Chambers in the manner posited by the Examiner would modify Chambers’ principle of operation (App. Br. 6). In particular, Appellants urge, Chambers uses its partitioned container to allow for precise ratios of the two phases to be dispensed (*id.* at 7).

Thus, Appellants reason, modifying Chambers by packaging the two phases together in a partitionless container “would not allow the compositions of Chambers to be dispensed separately in a predetermined and precise ratio which achieves the desired effect of the invention” (*id.* at 8 (citing Chambers, col. 2, ll. 4-11)).

Moreover, Appellants argue, because Chambers discloses that the partitioned container is required to avoid adverse interactions between the two phases, allowing contact between the two phases “as in the parti[t]ionless container of Hayward . . . would render the compositions unsatisfactory for their intended purpose” (*id.*).

Appellants do not present separate arguments with respect to any of the claims subject to this ground of rejection. We select claim 1 as representative of the rejected claims. *See* 37 C.F.R. § 41.37(c)(1)(vii).

In view of the positions advanced by Appellants and the Examiner, the issue with respect to this rejection is whether the evidence of record supports the Examiner's position that an ordinary artisan would have been prompted to package a striped personal cleansing composition, in which at least one stripe is a surfactant-containing cleansing phase, and at least one other stripe is a hydrophobic material-containing benefit phase, wherein "said cleansing phase and said benefit phase are in physical contact within said package," as recited in claim 1.

FINDINGS OF FACT ("FF")

Chambers

1. Chambers discloses:

An aqueous liquid cleansing and moisturising composition comprising a surface active agent and a benefit agent in which the surface active agent and benefit agent are separate but combinedly dispensable from a single packaging means in a predetermined ratio as discrete domains. Separating the benefit agent from the surface active agent results in improved deposition of the benefit agent.

(Chambers, abstract.)

2. Chambers discloses:

The surface active agent and benefit agent are dispensable from a single packaging means in a predetermined ratio according to the use for which composition is intended. An advantage of dispensing the surface active agent and benefit agent in combination is that it avoids the inconvenience of having to post mix the two components. This is particularly advantageous when the separate components of a composition

need to be mixed in precise ratios in order to achieve the desired effect.

(*Id.* at col. 2, ll. 4-11.)

3. Chambers discloses that the “discrete domains of the composition of the invention may be considered as separate stripes of surface active agents and of benefit agent” (*id.* at col. 2, ll. 12-14.)

4. Chambers further discloses:

It is an essential feature of the invention than the benefit agent and surface active agent are separate but combinedly dispensable from a packaging means and typically a single packaging means. Such a packaging means includes those systems which comprise two separate compartments. Ensuring that the surface active agent and benefit agent are separate can be achieved in a variety of ways. Packaging of the composition such that the surface active agent and benefit agent are presented in separate compartments or in separate domains within the packaging; including encapsulation of the benefit agent; and by processing of the composition by coextrusion to produce a striped product in which individual stripes contain either the surface active agent or benefit agent.

(*Id.* at col. 6, ll. 1-14.)

5. Chambers discloses that a further advantage of its composition “is that it provides a means whereby benefit agents which are sensitive to surface active agents, i.e. there is a detrimental interaction between the surface active agent and benefit agent, can be used because they are protected from the surface active agent” (*id.* at col. 6, ll. 16-20).

Hayward

6. Hayward discloses:

The invention relates to a plurality of liquid cleansing compositions having at least one lamellar phase which

possesses a lotion-like appearance conveying signals of enhanced moisturization and at least one abutting isotropic phase having enhanced cleansing ability. The inventive composition is contained in a partitionless container in one embodiment conveying signals of a plurality of compositions. This multiphase composition is stable upon storage and is dispensed as a striped product where typically one stripe has primarily a cleansing function and a second stripe has primarily a moisturization function.

(Hayward, abstract.)

7. As background, Hayward summarizes Chambers' disclosure, discussed above, of producing a striped composition by keeping the benefit agent and cleansing agent separate in a partitioned package (*id.* at col. 1, ll. 35-51).

8. Hayward discloses, however, that when the skin-conditioning hydrophobic emollients of its composition are included in a "lamellar phase" formed by combining the emollients with surfactants that produce micelles having a layered configuration (*id.* at col. 2, l. 18, through col. 3, l. 46), the emollients can be provided separately, but alongside, a lather-producing, surfactant-containing "isotropic phase" (*id.* at col. 3, l. 57, through col. 4, l. 2).

9. Thus, Hayward discloses, one "advantage of the inventive product is the fact that separate lamellar and isotropic compositions having specific functions, e.g. cleansing and moisturizing the skin may be simultaneously dispensed in a partitionless container" (*id.* at col. 4, ll. 33-37).

10. Hayward further discloses that, "[u]nexpectedly, the lamellar and isotropic phases in the inventive product remain separated (i.e. do not mix)

at room temperature for at least 70 days and at elevated temperature (50° C.) for at least one week" (*id.* at col. 4, ll. 40-43).

11. Hayward also discloses that, in preferred embodiments, "the lamellar and isotropic phases are rheologically compatible, i.e. they have the same flow properties under the conditions of filling, storage, and product usage" (*id.* at col. 4, ll. 18-20).

PRINCIPLES OF LAW

In *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), the Supreme Court reaffirmed that "when a patent 'simply arranges old elements with each performing the same function it had been known to perform' and yields no more than one would expect from such an arrangement, the combination is obvious." *Id.* at 417 (quoting *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273 (1976)).

Also, "[n]on-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. . . . [The reference] must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole." *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

ANALYSIS

Appellants' arguments do not persuade us that the Examiner failed to make a *prima facie* case of obviousness.

We acknowledge Chambers' teaching that it is essential to keep the cleansing and benefit phases of a striped composition packaged separately in a partitioned container so as to avoid undesirable interactions between the two phases (FF 1, 4, 5). We also acknowledge Chambers' teaching that it is advantageous to keep the cleansing and benefit phases of a striped

composition separate in a partitioned container when the two phases need to be mixed in precise ratios for use (FF 2).

The Examiner has not, however, applied Chambers by itself to show obviousness. Rather, as the Examiner points out, in a method suggested as an alternative to Chambers' partitioned package (FF 7), Haywood discloses that if a striped two-phase composition is prepared in the form of a lamellar/isotropic combination (FF 8), the skin-conditioning phase and cleansing phase can be simultaneously dispensed from a partitionless container, and the phases remain separated and stable for extended periods despite being in physical contact with each other (FF 9, 10). Thus, we are not persuaded that an ordinary artisan following the references' combined teachings would have been dissuaded from packaging striped compositions in partitionless containers.

Moreover, given Haywood's disclosure that the two phases of its striped lamellar/isotropic striped compositions have the same flow properties (FF 11), we are also not persuaded that following Haywood's teachings would have failed to provide a composition in which the two phases would be dispensed in the precise ratios required for optimal effect.

In sum, Appellants' arguments do not persuade us that the evidence of record fails to support the Examiner's position that an ordinary artisan would have been prompted to package a striped personal cleansing composition having the cleansing and benefit phases recited in claim 1, wherein "said cleansing phase and said benefit phase are in physical contact within said package," as also recited in claim 1. We therefore affirm the Examiner's obviousness rejection of claim 1 over Chambers and Haywood,

as well as the rejection of claims 2, 4, 5, 7-9, 14, and 19-29, which were not argued separately. *See* 37 C.F.R. § 41.37(c)(1)(vii).

OBVIOUSNESS -- CHAMBERS, HAYWARD, AND FRANTZ

The Examiner also rejected claims 10-13 as obvious over Chambers, Hayward, and Frantz (Ans. 6-7). Claim 10 is representative of the rejected claims. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Claim 10 depends from claim 1 and, among other things, requires the cleansing phase to comprise at least one alkanolamide (App. Br. 14). The Examiner relied on Chambers and Hayward for the teachings discussed above, and cited Frantz as teaching that alkanolamides were known to be useful in surfactant compositions included in shampoos, cleansers, and body washes, “including striped compositions” (Ans. 7 (citing Frantz [0122])).

The Examiner concluded that it would have been obvious to include an alkanolamide in the cleaning phase of Chambers’ compositions because Frantz teaches that a composition containing an alkanolamide, an anionic surfactant, water, and an electrolyte, as recited in claim 10, imparts “a free-flowing and non-Newtonian shear thinning property that provides the ability to suspend components or ‘benefit agents’ such as oils, skin care agents etc. . . . A skilled artisan would have expected to achieve a free-flowing cleansing phase [as also recited in claim 10] with a non-Newtonian shear thinning” (*id.* [0073]-[0076])).

Appellants argue that Chambers requires the cleansing and hydrophobic benefit phases to be kept separate, whereas the surface active agents and benefit agents in Frantz are in the same composition (App. Br. 9). In fact, Appellants argue, Frantz’s surface active agents “function as delivery systems for the benefit agents (*id.* (citing Frantz [0120]-[0122])).

Thus, Appellants conclude, “[m]odifying Chambers by not physically separating the surface active agents and the benefit agents in a partitioned package in view of Frantz would change the principle of operation of Chambers” (App. Br. 9). Moreover, Appellants urge, this modification “would not allow the compositions of Chambers to be dispensed separately in a predetermined and precise ratio which achieves the desired effect of the invention” (*id.*).

Appellants’ arguments do not persuade us that the Examiner failed to make a *prima facie* case of obviousness.

We acknowledge Frantz’s disclosure that “examples of components that may be suspended by the compositions of the present invention are a number of benefit agents. A ‘benefit agent’ means any active ingredient that is to be delivered into the skin or hair, or onto the skin or hair, or both, at a desired location” (Frantz [0074]). We also acknowledge that some of Frantz’s benefit agents are hydrophobic fats and oils encompassed by the benefit phase recited in Appellants’ claim 1, rather than the cleansing phase (*id.* at [0075]).

However, given Frantz’s disclosure that its alkanolamide-containing compositions are, in general, useful as surfactants (*see, e.g.*, abstract), and given the disclosure that Frantz’s surfactants are useful in suspending a number of non-hydrophobic substances used in personal cleansing compositions (*id.* at [0073] and [0076]), we are not persuaded that an ordinary artisan would have been dissuaded from including an alkanolamide in the cleansing phase of a striped two-phase personal cleansing composition such as that disclosed by Chambers or Hayward. In this regard, Appellants point to no disclosure in Frantz suggesting that its composition would have

failed to act as a surfactant when present in the cleansing phase of Chambers' or Hayward's personal care products.

Appellants also argue that an ordinary artisan would not have been motivated to modify Chambers in view of Frantz, given Chambers' disclosure that separate packaging of the cleansing and benefit phases is required for proper deposition of the combined products (App. Br. 9-10). As discussed above, however, we do not find this argument persuasive, given Hayward's disclosure that the cleansing and benefit phases can be packaged in contact with each other under the appropriate circumstances.

In sum, Appellants' arguments do not persuade us that the Examiner failed to make a *prima facie* case of obvious with respect to claim 10. Accordingly, we affirm the Examiner's obviousness rejection of that claim over Chambers, Hayward, and Frantz, as well as the rejection of claims 11-13, which were not argued separately. *See* 37 C.F.R. § 41.37(c)(1)(vii).

SUMMARY

We affirm the Examiner's rejection of claims 1, 2, 4, 5, 7-9, 14, and 19-29 as obvious over Chambers and Hayward.

We also affirm the Examiner's obviousness rejection of claims 10-13, over Chambers, Hayward, and Frantz.

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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Application 10/665,670

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